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No. 137

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 187

PEOPLE OF THE STATE OF CALIFORNIA, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The Commission's opinion and order of December 23, 1959 are found at J. App. 1290–1310 and reported at 22 FPC 1091, and its order denying rehearing at J. App. 1353–1358, reported at 23 FPC 350. The examiner's decision is found at J. App. 1149–1240 and is reported at 22 FPC 1102. The opinions in the Court of Appeals (Pet. App. 1–15) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 30, 1961. The petition for a writ of certiorari was filed on June 28, 1961. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether it was proper for the Federal Power Commission to proceed in this case to consider and act upon a proposed merger of the assets of the El Paso Natural Gas Company and the Pacific Northwest Pipe Line Corporation when the proposed merger of assets was preceded by El Paso's acquisition of 99% of Pacific's stock and the stock acquisition was the subject of a pending but continued suit by the United States under Section 7 of the Clayton Act.

2. Whether, in finding that the merger of the El Paso-Pacific assets satisfied the public convenience or necessity standard of the Natural Gas Act, the Commission adequately inquired into and weighed the economic impact of the merger in terms of the relevant policies, including those expressed in Section 7 of the Clayton Act.

3. Whether the proceedings leading to the Commission's approval of the merger, and the approval itself, contravened any of the requirements of due process.

STATUTES INVOLVED

The pertinent portions of the Natural Gas Act and of the Clayton Act, as amended, are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

This case was before the Court of Appeals on the petition of the State of California to review an order of the Federal Power Commission (J. App. 1290)

authorizing El Paso Natural Gas Company (El Paso) to acquire and operate the facilities of Pacific Northwest Pipeline Corporation (Pacific) by a merger of the assets of the two corporations. The Court of Appeals, by a divided vote, affirmed the Commission's order (Pet. App. 1–15). California now seeks review of that decision by this Court.

1. *Background.* El Paso, a Delaware corporation, has its principal place of business at El Paso, Texas, and its principal facilities constitute a single integrated pipeline system. It operates pipelines extending from the Permian Basin area of western Texas and eastern New Mexico across the southern portions of Texas, New Mexico, and Arizona, to Blythe, California. It also operates pipelines from the Permian Basin area across the central portion of New Mexico to the San Juan Basin area and thence across the northerly portion of Arizona to the California border near Topock, Arizona (J. App. 1291).

Pacific was a Delaware corporation with its principal place of business in Salt Lake City, Utah. Prior to its merger with El Paso, it owned and operated a pipeline system commencing at Ignacio, Colorado, in the San Juan Basin, where it was interconnected with El Paso's northern pipelines, and extending through the States of Colorado, Utah, Wyoming, Idaho, Oregon, and Washington to its northern terminus at Sumas, Washington. Pacific produced natural gas from its own leaseholds and purchased gas from other producers in the San Juan Basin and in various fields of the Rocky Mountain area. It also purchased gas from Westcoast Transmission Company, Ltd., at the

Canadian border (J. App. 1292). Pacific was authorized to sell gas in all the states through which its pipelines extended (Pet. App. 3).

In 1955, El Paso became interested in the Pacific system and in the early part of that year the possibility of merger was discussed. Negotiations broke down, however, when El Paso insisted upon a merger of assets, which would have required Federal Power Commission authorization (Pet. App. 3). In 1956, negotiations resumed and culminated in an agreement, on November 8, 1956, pursuant to which El Paso, by May 1, 1957, had acquired 99.8% of Pacific's stock (J. App. 1293).

On July 22, 1957, the United States brought suit against El Paso and Pacific in the Utah federal district court (Civil Action No. 143–57, Central Div.) complaining that, under Section 7 of the Clayton Act (15 U.S.C. 18, App. *infra*, p. 23), El Paso's acquisition of Pacific stock substantially lessened competition and tended to create a monopoly. Stimulated by the imminence of the Clayton Act suit (Pet. App. 4), the boards of directors of El Paso and Pacific had authorized a merger of assets of the two corporations on July 16, 1957; and on August 7, 1957, El Paso and Pacific applied, under Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c), App., *infra*, pp. 24–25), to the Power Commission for authority to merge their assets.[1] Application to the Commission was immedi-

[1] Application to the Commission was in the form of an application by Pacific for a certificate authorizing it to abandon facilities and services (Section 7(b), 15 U.S.C. 717f(b)) and an application by El Paso for a certificate approving its acquisition of Pacific's facilities (Section 7(c), 15 U.S.C. 717f(c)). (Pet. App. 4, n. 3).

ately followed by a motion by El Paso and Pacific in the Utah district court seeking a dismissal of the Clayton Act suit on the ground that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a cause of action upon which relief could be granted, or, in the alternative, requesting a stay of all proceedings in the district court pending determination by the Commission of El Paso's and Pacific's applications. The theory of the motion was that the filing of the applications with the Commission gave that agency primary jurisdiction to pass upon the issues raised in the Clayton Act suit. The motion was denied by the district court, and the El Paso-Pacific motion in this Court for leave to file a petition for a writ of certiorari was subsequently denied. See *El Paso Natural Gas Co.* v. *United States*, 355 U.S. 950, No. 365, Misc., Oct. T., 1957.

In the proceedings before the Commission, after intervention by a number of parties, including the State of California, September 17, 1958, was fixed as the date for the commencement of hearings on the applications. The hearing began as scheduled before an examiner and continued for 23 non-consecutive days, concluding on January 6, 1959 (J. App. 1294–1295). On October 2, 1958, El Paso and Pacific moved in the Utah district court for a continuance of the antitrust actions. On October 6, 1958, the Department of Justice wrote the Commission requesting it to postpone the examiner's hearing pending the final outcome of the antitrust case then set for trial on November 17, 1958. In response to this letter, the Commission, on

October 7, wrote the Utah district court stating that, if the district court were to deny El Paso's motion of October 2 and to decide to proceed with the antitrust trial, the Commission would continue its merger proceedings to a date which would not conflict with the court trial. The court was advised that, if El Paso's motion for a continuance were granted, the Commission would proceed with its hearings. On October 13, the district court continued the antitrust suit until a final decision in the Commission proceedings (J. App. 1177–1178).

2. *The Commission's Decision.* (*a*) Hearings on the El Paso-Pacific applications were concluded on January 6, 1959, and the examiner's decision approving the merger (with conditions) was issued, subject to review by the Commission, on November 20, 1959 (J. App. 1149–1240). Following exceptions to the decision filed (*inter alia*) by California, the Commission heard argument on December 10, 1959, and on December 23 issued its order (J. App. 1290–1310) approving the asset merger and adopting the examiner's decision with a condition requiring that tax savings resulting from tax loss carry-overs from the books of Pacific be credited to a special reserve for the benefit of consumers and also with a condition that accounts be kept separately for the two underlying systems for purposes of future rate proceedings. The order was served on all parties. No application for a stay having been filed, the merger was consummated under Delaware law on December 31, 1959. A petition for rehearing (J. App. 1340–1350) filed by California on

January 20, 1960, was denied by the Commission on February 17, 1960 (J. App. 1353).

(*b*) The Commission's approval of the merger rests upon findings which, in sum, may be stated as follows: The merger would result in (1) improved supply and better utilization of gas reserves; (2) a financially stronger gas supplier; (3) expanded and improved gas service to the public; and (4) the probability that rates would be lower in the future as a result of the merger than with the two companies operating independently (J. App. 1297–1303; 1196–1238).[2]

Consistently with *City of Pittsburgh* v. *F.P.C.*, 237 F. 2d 741, 754 (C.A. D.C.), the Commission did not purport to determine whether the El Paso-Pacific merger violated the Clayton Act but did consider the bearing of the antitrust laws on the public convenience and necessity standard under Section 7(e) of the Natural Gas Act (15 U.S.C. 717f(e), App., *infra*, p. 25). In this connection, the Commission recognized that the merger would eliminate Pacific as a competitor (J. App. 1296). It compared the situation which would follow the merger with the situation which would exist if there were no stock control of Pacific by El Paso because, as it said (J. App. 1299), "* * * the record shows that El Paso intends to dissolve the

[2] Although the merger would result in savings tending to lower rates for the future, it would have no immediate effect in this respect, since El Paso merely took over Pacific's entire structure of rates and adopted them as its own, agreeing at the same time not to raise any of them for a year after the merger (J. App. 1303).

parent-subsidiary relationship if the merger is not achieved * * *."

As a result of its inquiry on this basis, the Commission found that the lessening of competition through the merger would not be substantial and did not stand in the way of its approval of the merger because the factors described above outweighed any lessening of competition, whether in the consumer markets or the producing fields, resulting from the elimination of Pacific as a competitor. The Commission also noted that additional competition for El Paso was in prospect from the Transwestern Pipeline Company which the Commission had certificated to construct a pipeline from the Panhandle-Hugoton field and the Permian Basin to a point on the California-Arizona border near Topock, Arizona, where gas will be delivered to Pacific Lighting Gas Supply Co. which will, in turn, transport and sell gas to Southern California companies (J. App. 1295–1296). Further, the Commission took note of its Docket No. G–17350, an application by Pacific Gas Transmission Company to build a pipeline to transport Canadian-produced gas from a point on the border near Kingsgate, B.C., to Klamath Falls, Oregon, near the California border (J. App. 1296). The Commission indicated, with respect to possible competition for the natural gas supply, that Pacific would probably not have been a competitor with El Paso in the Permian Basin or the Panhandle-Hugoton area. On the other hand, it noted that Southern Union Gas Company obtains gas from the San Juan and Permian Basins; that Transwestern may well become a competitor in the San

Juan Basin; and that, in the Rocky Mountain area, competition will likely come from Colorado Interstate, Mountain Fuel Supply and others, and in Canada, from Pacific Gas Transmission Company and others (J. App. 1297).

To protect against the possibility that the merger would have the effect of shifting Pacific's higher unit costs onto all the customers served by the combined system, the Commission broadened a condition recommended by the examiner that all costs for the underlying systems be recorded and kept separately so that in a future rate case they can be properly allocated (J. App. 1303–1306). It also added the condition that the tax savings made possible by the merger inure to the benefit of the ultimate consumer (J. App. 1301, 1309–1310).

3. *The decision of the Court of Appeals.* Of the numerous participants in the Commission proceedings (J. App. 1149–1155),[3] only the State of California petitioned for appellate review of the Commission's order of December 23, 1959. In its petition for review (J. App. 1361–1365), California specified six errors which, as distilled by the Court of Appeals, were as follows (Pet. App. 5–6): (1) The Commission did not give sufficient or proper attention to the impact of the merger upon future rates to customers; (2) the Commission failed to give proper attention and effect to the policies and terms of the antitrust laws; and (3)

[3] The States of Arizona, Idaho, Nevada, New Mexico, Texas, Washington, and Wyoming intervened and affirmatively supported the merger (J. App. 1155). The Department of Justice was invited to intervene but declined to do so.

California was denied due process in that the examiner failed to examine documents filed in evidence.

El Paso intervened as a party respondent in the Court of Appeals and appeared in support of the merger. With the Solicitor General's authorization,[4] the Department of Justice, on behalf of the United States, filed a brief *amicus curiae* because of the possible impact of the Commission's action upon the enforcement of the antitrust laws and of the possible effect of the Commission's order upon the Clayton Act suit pending in the Utah district court. As *amicus*, the United States urged that the Commission's order be vacated and the cause remanded with instructions that the Commission either deny the application or await the outcome of the Clayton Act suit.

The Court of Appeals affirmed. With respect to California's contention that the Commission failed to give sufficient or proper attention to the impact of the merger upon future rates, the court agreed with the Commission that its forecast that operating costs would be reduced in the long run, taken together with the condition preserving for a future rate case the actual allocation of costs as between the two underlying systems, made inquiry into specific future rates unnecessary at this time (Pet. App. 7–9). With respect to the contention that the Commission's approval of the merger was, in part, based upon the erroneous premise that under Section 7 of the Clay-

[4] Rule 18(j) of the Court of Appeals, prior to January 16, 1961, required that briefs *amicus* filed by the United States be "sponsored by the Solicitor General."

ton Act[1] its approval would immunize the merger from liability under the Clayton Act, the court noted that the Commission had no authority to pass upon the issue and had not purported to do so. The court, however, agreed with the Commission that, in passing on a merger application under Section 7(c) of the Natural Gas Act, the Commission must give heed to the policies and provisions of the antitrust laws and held that the Commission had sufficiently considered them in this case (Pet. App. 9–10). Finally, California's due process argument was determined to be without merit (Pet. App. 14).

Though in dissent, Judge Fahy agreed with most of the opinion of Judge Prettyman who was joined by Mr. Justice Burton. The point of departure was not over the merits of the Commission's order or the legality *vel non* of the merger, but over the propriety of the Commission's approval of the asset merger when the legality of the stock acquisition was being challenged in the Utah district court. Agreeing with the position espoused by the United States as *amicus*, Judge Fahy would have vacated the Commission's order with instructions to deny the application for approval or await the outcome of the antitrust litigation (Pet. App. 14–15).

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[1] "* * * Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Federal Power Commission * * * under any statutory provision vesting such power in such Commission * * *."

ARGUMENT

I

In issuing El Paso a certificate of public convenience and necessity authorizing the El Paso-Pacific merger of assets, the Federal Power Commission was discharging its responsibilities under the Natural Gas Act. The Commission's task, in this case, was complicated by the fact that the United States (through the Department of Justice) was, at the same time, in the process of carrying out its responsibilities under the Clayton Act. There is still an area in which these respective responsibilities have not been formulated in detail, and the contemporaneous Clayton Act suit presented the Commission with the question whether to proceed to consider the application for approval of the merger of assets or to defer to the court and await the outcome of the antitrust proceeding. The Commission offered to defer to the district court, thus giving that tribunal the choice as to which body should proceed first. The court chose to wait for the Commission. Though the Department of Justice remains of the view that the legality *vel non* of the stock acquisition, which preceded the asset merger application, should have been determined first by the district court, the Department agrees with the Commission that the court below was correct in holding that, as the circumstances developed on October 13, 1959 (when the district court continued the Clayton Act suit), the Commission acted within

its discretion in proceeding to a decision.* Cf. *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152, 161–162.

We see little, if any, benefit to be derived from this Court's review of the discretion exercised by the Commission, and accordingly oppose the petition filed by California. The problem which this case presents appears to be unique. In the 23-year history of the Natural Gas Act, the Commission has never before been called upon to approve a proposed merger of assets which followed a stock acquisition under review by a court in an antitrust proceeding. The decision of the Court of Appeals does not conflict with that of any other court, and there is no reason to believe that the problems presented by the special

* Petitioner's contention (Pet. 16–19) that the doctrine of primary jurisdiction applies in this case, and that under that doctrine the Commission was required to defer to the district court, as a matter of law, is without merit. The issues to be resolved by the district court in the Clayton Act proceeding are different from the question decided by the Commission. The ultimate issue in the Commission's proceeding was not the statutory test which the district court will apply in determining the legality of the stock acquisition under Section 7 of the Clayton Act. Unlike the broad standard of "public convenience and necessity" in Section 7 of the Natural Gas Act, the touchstone of illegality under the Clayton Act is narrower: whether the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly. In other words, the Clayton Act is concerned solely with the effects of an acquisition upon competition, and not the broader issue whether an asset consolidation may appear justified by "public convenience and necessity" despite its anticompetitive aspects (which the Commission found here were not substantial). See *El Paso Natural Gas Co.* v. *United States*, No. 365, Misc., Oct. T., 1957, 355 U.S. 950.

history of this litigation, and of the underlying transactions, will recur.

As for the effect of the Commission's order upon the Clayton Act suit, the Court of Appeals ruled squarely that it was not passing upon the "question whether a transaction duly approved by the Commission, acting within its statutory authority, is or is not thereafter subject to the antitrust laws" (Pet. App. 9), and it left that problem completely open. The court also declared that "the Commission has no authority to pass upon that question, and it has not purported to do so here" (Pet. App. 9). It is true that the Commission, in its order, observed that, under the concluding paragraph of Section 7 of the Clayton Act (App., *infra*, p. 23), transactions such as that before it are exempt from the antitrust laws when "consumated pursuant to Commission authority" (J. App. 1295). But this was a mere aside, not a holding or a considered ruling, and the Commission agrees with the Department of Justice that that issue remains wholly open for litigation in the pending district court action in Utah. The possible impact of the Commission's order on the antitrust suit was not before the Commission, and the Commission made no ruling with respect to the collateral impact, if any, of its order. The Department of Justice continues of the view that no immunity results from the Commission's order.

II

The record and the petition do not present any other question warranting review by this Court.

Even apart from the pending antitrust suit, the Commission, in reaching a decision, would have been obliged to consider the public interest from the standpoint of the antitrust implications of the merger.[7] It did so in this case by comparing the situation following the asset merger with that which would prevail if there were not even stock control of Pacific by El Paso (*supra*, pp. 7–8). Thus, its decision was not predicated upon the existence of the stock acquisition as a postulate, but rather upon the comparative merits of the merger of the companies versus complete separation. The judgment the Commission made on the "public interest" factors before it—including the competitive factors—is a rational one, turning on the particular facts of this case, and should not, in our view, be reviewed by the Court. Petitioner's attacks upon the legality of the order are insubstantial.

1. The examiner's and the Commission's consideration of the economic effects of the merger was extended and detailed. The examiner gave full consideration to actual, potential and prospective competition for markets, especially the California market, and for sources of supply (J. App. 1185 *ff.*). The Commission, after finding that the impact on competition would not be substantial, found that the merger constitutes a step in the direction of increased supplies of gas and better utilization of reserves (J. App. 1297–1299). The addition of El Paso's markets

[7] *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A. D.C.).

to Pacific's line would stimulate exploration and development in regions which hold promise of future gas reserves and Rocky Mountain sources would become available to El Paso's rapidly expanding markets. El Paso's dependence upon gas produced in connection with oil would be reduced by the addition of Pacific's sources of dry gas, which would aid conservation and promote efficiency (J. App. 1298–1299).

The companies would have improved financial standing as a result of the merger, the Commission found (J. App. 1299–1300). The longer life of Pacific's gas reserves would aid El Paso to market bonds of longer maturities with consequent savings in financial costs, and Pacific's low earnings could be expected to improve when greater use is made of its pipeline system facilities (*Id.*). The merger would not only make available additional supplies of gas to California and other markets, but would make better use of Pacific's capacity and provide increased flexibility of operations which could not readily be achieved if the two corporations were separate and independent, or as economically achieved between affiliates (J. App. 1301–1302).

The accounting requirements in the Commission's order (*supra*, p. 9) (J. App. 1304, 1308–1309) make it clear that the "rolling-in" of Pacific's higher costs with those of El Paso, and the fixing of rates for both of the merged systems at the same level, is not a necessary consequence of the merger. The question of just and reasonable, and not unduly discriminatory or preferential, rates for each system will remain for determination (after hearing) in a rate proceeding.

All issues as to specific future rates were left for such a hearing; but the Commission found (on ample evidence) that the merger would probably result in savings tending to hold rates down (J. App. 1303).

As the court below found, the Commissions' detailed findings and determination are based upon substantial evidence, it properly weighed the relevant factors bearing on the public interest, and it made a rational judgment in ascertaining the present and future public convenience and necessity.

2. Petitioner's contention that evidence in the record was ignored arises from a statement made in another proceeding by the hearing examiner with respect to his consideration of the record in this case. He said (Pet. 24):

> I assure you, gentlemen, that when I searched the record for the things that were dispositive of the issue, I didn't examine carefully 15 of those 500 documents. There was no occasion to. There was absolutely no occasion to examine as many as 15 of those 500—maybe it was 25.

California claims that this statement shows a denial of due process in that the examiner failed to consider the whole record. However, the statement shows, not that the examiner failed to search the record, but, on the contrary, that he did search it for relevant material.[8]

[8] The exhibits petitioner now claims were indispensable are two in number—Nos. 420 and 421 (Pet. 24). Neither of these was called to the attention of the examiner in California's brief before him, nor to the Commission's attention in California's exceptions (see footnote 9, *infra*) or in its appli-

Innumerable exhibits which California now claims were improperly ignored were put in evidence because El Paso, not knowing the full extent of the challenge to its application, introduced full support for its entire application. However, the ultimate issues, as it developed, were relatively narrow in scope and it was therefore possible for all controverted questions to be resolved on the basis of a limited portion of the record. All that the examiner was saying was that he could easily tell that most of the documents in evidence were irrelevant, and that he was required by the ultimate issues in the case to examine "carefully" only a relatively small number. California could not have been aggrieved or deprived of a fair hearing by his failure to examine "carefully", and in minute detail, every contract and every geological report and every service agreement put into the record—which had no true bearing on the case. The comment of the Court of Appeals bears repeating: "The inundation of the material with immaterial minutiae is one of the griefs which beset the administrative process. It is well to recognize it" (Pet. App. 14).

3. Petitioner's other contentions (Pet. 28–29) concerning the procedural regularity of the Commission proceedings are wholly unsubstantial. We perceive

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cation for rehearing. Under Section 19(b) of the Gas Act (15 U.S.C. 717n(b)), and repeated decisions of the courts, no objection not urged in the application for rehearing before the Commission can be considered on judicial review, unless there is reasonable ground for failure so to do. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 158; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650–651.

no basis whatever for the complaint that the examiner and the Commission took notice, as they could, of the Commission's docket and of the pending applications of Transwestern and Pacific Gas Transmission Company.[9] See *Market Street R. Co.* v. *Comm'n.*, 324 U.S. 548, 562. No more substantial is petitioner's claim that it was prejudiced by a denial of the right of cross-examination (Pet. 32). This point is made for the first time in this Court and need not be considered. See footnote 8, *supra*, pp. 17–18. The claim, in any event, finds no support in the record of the proceedings before the examiner.[10]

4. Finally, petitioner complains of assertedly improper conduct by the Commission in the form of *ex parte* contacts with California's adversaries "which may have resulted in prejudicial error against it" (Pet. 30). The Court of Appeals did not dignify with any comment this argument, which was presented in petitioner's reply brief below but never before raised. We likewise believe it to be insubstantial.

(*a*) The Congressional hearings on which this claim

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[9] Petitioner made no reference in its exceptions (to the examiner's decision) to the propriety of noticing the nature and content of the applications. Under the Commission's Rules of Practice and Procedure, Rule 1.31(c), this omission constitutes a waiver of the objection. See *State of Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183, 186–187 (C.A. D.C.), certiorari denied, 345 U.S. 934.

[10] "* * * Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. * * *" *Market Street R. Co.* v. *Comm'n.*, 324 U.S. 548, 562.

is based were held from May 10 through May 24, 1960. At that time the record in this case had not been certified by the Commission and the jurisdiction of the Court of Appeals had not yet become exclusive. If California felt that testimony at the hearings warranted the disqualification of any Commissioner, the proper course would have been to ask the Commission to reconsider its action in the light of these disclosures. *Neisloss* v. *Bush*, C.A. D.C. No. 15774, decided June 8, 1961. That course was not taken.

On June 13, 1960, the record was filed in the Court of Appeals, and the jurisdiction of that court to "affirm, modify, or set aside" the order complained of became exclusive (Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b)). It would then have been appropriate for petitioner to make a motion to the court, as provided in Section 19(b) of the Gas Act, 15 U.S.C. 717r(b), to remand because of disclosures in the Congressional proceedings, or perhaps to modify the petition for review of the Commission's order. California did not follow either of those courses, but instead presented the issue for the first time in its reply brief filed in December 1960 in the Court of Appeals. In these circumstances, the matter was not properly before the court below and is not properly before this Court.

(*b*) In any event, there is no semblance of merit to petitioner's complaint. The transcript of the Congressional hearings as well as the staff report and the committee report all show that the main focus of the committee's hearings was on matters other than this case. References to this case are few, and those ref-

erences show no improper conduct." California states (Pet. 11) that the expedition of matters before the Commission was mentioned *ex parte*, and implies that the merits of "some matters", possibly including this case, were discussed. The general quotation given in the petition is from the testimony of Commissioner Kline, relating to Mr. Wimberly, a former Commissioner and a social acquaintance of Commissioner Kline, who did visit the Commissioner at his office occasionally. But on the same page of the hearings appears a specific statement by Mr. Kline that Mr. Wimberly did not discuss the present case with him.[12] The fact is that (as shown in the pamphlet

[11] El Paso submitted to the court below a printed pamphlet setting forth all the portions of the hearings to which California referred below (and to which it refers in its petition to this Court). A copy of that document ("Resumé of Relevant Matters and Extracts from Transcript of Hearings Before a Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 2d Sess., May 10, 11, 12, 13, 16, 17, 18, 19, 20, 23 and 24, 1960") is being lodged with the Clerk.

[12] See p. 199 of the printed Hearings Before a Special Subcommittee on Legislative Oversight (fn. 11, *supra*):

> MR. LISHMAN [Counsel for the Subcommittee]. Well, during this time weren't active merger negotiations going on between El Paso Natural Gas Co. and Pacific Northwest Pipe Line Corp.?
>
> MR. KLINE. That is true.
>
> MR. LISHMAN. Wasn't there discussion of an antitrust suit being brought by the Department of Justice?
>
> MR. KLINE. That is true during all of this period, but I do not believe Mr. Wimberly ever discussed any phase of that case with me at any time. He has never at any time approached me improperly and I don't believe he ever discussed a case while it was pending in any manner with me.

mentioned in footnote 11) there is no mention of this case in the transcript of the Congressional hearing which can reasonably be construed as showing improper conduct by any Commissioner.

The preservation of the integrity of administrative proceedings is a matter of high public importance. The reviewing court should direct a full inquiry upon receiving cause to believe that improper contacts were made or improper influences were brought to bear. In the present case, however, there is not the slightest evidentiary foundation for the insinuations in California's petition, and they were properly ignored by all three judges in the court of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1961.

APPENDIX

Section 7 of the Clayton Act, 38 Stat. 730, 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
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> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission * * *.

Section 7 of the Natural Gas Act, 52 Stat. 824, as amended, 56 Stat. 83, 15 U.S.C. 717f, provides in part as follows:

> (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.
>
> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.
>
> (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall

engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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U.S. GOVERNMENT PRINTING OFFICE: 1981